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No. 08-118

In the Supreme Court of the United States

EDUARDO A. MASFERRER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner's 30-year sentence is at least twice—and likely three times—what he would have faced if the district court had not found two critical facts by a simple preponderance of the evidence and employed a loss causation analysis that has been soundly rejected for use in civil litigation (and by some circuits for use in criminal litigation). In other circuits, petitioner would have been entitled to (1) a heightened review of the facts supporting such a disproportionate increase to his sentence and (2) a loss causation analysis adhering to the principles articulated in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005).

The government expressly acknowledges the "division among the circuits" on the first question presented, Opp. 12, and does not dispute that the circuits are also split on the second, see Opp. 12-15. Instead, the government contends that petitioner did not adequately raise those precise issues below, and that neither circuit split requires resolution here. The government is wrong on both counts.

1. Contrary to the government's assertion (see Opp. 8), petitioner squarely asked the courts below to apply a more exacting standard than simple preponderance of the evidence before finding facts that had a substantial and disproportionate impact on his sentence. And, notwithstanding the government's hope that the conflict on this issue will dissipate after *Booker*, it is clear that the circuits remain deeply divided. This question is squarely presented here and merits this Court's review.

a. In terse rulings from the bench, the district court adopted two facts based on the presentence report: that petitioner's relevant conduct continued after the adoption of the 2001 Sentencing Manual, and that petitioner's offense caused losses exceeding $20 million. Based on those findings, the district court added at least 17½ years to petitioner's sentence in an otherwise garden-variety fraud case. At the very first opportunity to object—petitioner's Objections to the Presentence Report and Motion for Downward Departure—petitioner explicitly argued that "[g]iven the potential effect on his offense level * * * the standard of proof for showing loss should be higher than a preponderance of the evidence." 04-CR-20404-KMM Docket Entry No. 506, at 10 (July 19, 2006) ("Dkt."). At the sentencing hearing, petitioner's counsel preserved this objection in language that could hardly be clearer:

> I just want to make sure that I have preserved my objection on the issue of the standard of proof because now we are in a situation because of the amount of the loss that the proverbial tail is going to wag the dog in the sentence, and so we would ask for a higher standard of proof than preponderance. I just want to make sure that that objection we put in writing is preserved.

July 26, 2006, Tr. 25. The district court responded with equal clarity when it denied that objection, stating that "the standard that I'm applying is a preponderance of the evidence." *Ibid.* It applied the 2001 Sentencing Manual's enhancement for losses greater than $20 million. *Id.* at 22. "I understand," the sentencing judge added, "that the amount of the

loss is the tail that wags the dog" in petitioner's case. *Id.* at 25.

Petitioner continued to press this issue before the court of appeals. See, *e.g.*, Pet. C.A. Reply Br. 27 (arguing that the district court inappropriately "found *by a preponderance of the evidence*" that petitioner's conduct continued into 2002). The court of appeals held that, despite the substantial increase to petitioner's sentence, "the [district] court was simply required to find by a preponderance of the evidence" that petitioner's conduct continued past November 1, 2001, Pet. App. 8a-9a, and to have made only "a reasonable estimate of the loss" under that same standard, *id.* at 10a. Because petitioner clearly raised his objection to the preponderance standard in the proceedings below, it is simply not true that "petitioner argued only for different facts" and "not a different standard of proof." Opp. 8; see also *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) ("Any issue pressed or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari * * *.").

It is also clear that petitioner preserved this argument with respect to each of the two factual findings that caused the dramatic increase to his sentence. At issue here is a single sentencing enhancement under U.S.S.G. § 2B1.1(b)(1) of the 2001 Sentencing Manual, and the resulting boost to petitioner's sentence of at least 17½ years. In order to apply that disproportionate increase, the district court had to find *both* that petitioner's conduct continued after November 1, 2001, *and* that his conduct caused more than $20 million in losses. It is difficult to see how petitioner's objection to this

enhancement on the ground that he was entitled to a heightened standard of proof could have applied to one necessary fact but not to the other. In any event, even if petitioner did not articulate at the time that his clear objection to the standard of proof extended to both facts, petitioner nevertheless properly raised this claim below and preserved the first question presented for this Court's review. See *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

b. Respondent recognizes the "division among the circuits," Opp. 12, on the standard of proof a judge should apply to fact-finding that may result in disproportionate sentencing increases. Indeed, this Court has acknowledged that division. See *United States* v. *Watts*, 519 U.S. 148, 156-57 & n.2 (1997); see also Pet. 12. The government argues that the split did not survive *United States* v. *Booker*, 543 U.S. 220 (2005), but that assertion is plainly wrong. Both the Eighth and Ninth Circuits have addressed this issue since *Booker*, and they remain squarely opposed to the Eleventh Circuit and others on this question.

In *United States* v. *Archuleta*, 412 F.3d 1003 (8th Cir. 2005), the court of appeals reviewed a defendant's sentence to determine whether "judge-found facts" under a preponderance standard resulted in "such an increase [to defendant's sentence] that we would say the enhancements were the tail that wagged the substantive offense," *id.* at 1007. "Nothing in *Booker*," the court held, "changes the interpretation" of that principle. *Ibid.* The Eighth Circuit has reaffirmed that position since the

filing of this petition. See *United States* v. *Garth*, 540 F.3d 766, 773 n.2 (Sept. 3, 2008) (acknowledging a circuit split and stating that the Eighth Circuit has "summarily dismissed the argument that the tail can no longer wag the dog now that the Guidelines are advisory").

Likewise, the Ninth Circuit has applied ("both before and after *Booker*," Opp. 10) its heightened standard of proof whenever any "sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction." *United States* v. *Lynch*, 437 F.3d 902, 916 (9th Cir. 2006) (en banc) (per curiam); see also *United States* v. *Staten*, 466 F.3d 708, 718 (9th Cir. 2006) (en banc) ("[T]he clear and convincing standard still pertains post-*Booker* for an enhancement applied by the district court that has an extremely disproportionate effect on the sentence imposed.").

The government claims that the Eighth Circuit's cases should be disregarded because, although that court expressly applied a heightened standard of proof and rejected the Government's *Booker* argument, it found the evidence sufficient to support the sentences. But surely the Eighth Circuit is no less opposed to the Eleventh on this issue merely because it has not had occasion to vacate a sentence under that Circuit's heightened standard of proof. The government's apparent belief that the court will reverse course in a case where that standard results in relief for a defendant is mere wishful thinking.

As to the Ninth Circuit, the government concedes that that circuit continues to apply a heightened standard of proof to facts that disproportionately

increase a defendant's sentence. See Opp. 10. And the government does not dispute that the Ninth Circuit would apply a heightened standard to loss calculations that, as in this case, have such a disproportionate effect. See *id.* at 10-11. Nonetheless, the government hypothesizes that the Ninth Circuit may someday choose not to apply its heightened standard to findings regarding the timing of criminal conduct even where, as here, that fact has the same disproportionate impact on a defendant's sentence. The Ninth Circuit has not actually carved out such an exception, of course, and respondent offers no logical reason to expect that it would do so. See *Lynch*, 437 F.3d at 916 (applying heightened standard to any "sentencing factor"). Respondent has proffered the mere possibility that the court may draw a distinction without a difference, as though cases in which the tail wags the dog might somehow end up turning on the color of the tail.[1]

2. The government's attempt to dodge the second question presented is equally unavailing. As explained in our petition (at 21-23), whether *Dura*'s loss causation principles apply in criminal securities fraud prosecutions has deeply divided the courts of appeals. The government finds fault with the way in which petitioner presented this argument to the

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[1] No "threshold question" prevents this Court's review in this case. See Opp. 11 n.4. The longstanding application of ex post facto principles to the Sentencing Guidelines is not at issue here. The Eleventh Circuit continues to apply those principles, see *United States* v. *Aviles*, 518 F.3d 1228 (2008) (vacating and remanding for resentencing because "the district court should use the appropriate Guidelines Manual under an ex post facto analysis"), and it applied that analysis to this case, see Pet. App. 8a-9a.

courts below, but it is beyond serious doubt that petitioner squarely presented this claim. Moreover, the fundamental importance of this question—in effect, whether a criminal defendant's *liberty* should be afforded the same protections as a civil defendant's *money*—cannot be overstated. This Court's review is urgently needed, both to remedy the serious injustice petitioner has suffered in this case and to prevent scores of other defendants from facing a similar fate.

a. Petitioner far more than "obliquely" objected to the district court's rejection of the loss causation principles articulated in *Dura*. See Opp. 8. Indeed, as detailed below, petitioner devoted pages of briefing and substantial oral argument to his contention that the district court impermissibly calculated losses by a method that, as a matter of law, did not reflect actual economic losses that were proximately caused by his conduct. See *Dura*, 544 U.S. at 342-47.

To explain and support his objection, petitioner pointed both the district court and the court of appeals directly to the leading case that has applied *Dura*'s loss causation principles to criminal sentencing. See Pet. C.A. Br. 60, 62 (citing *United States* v. *Olis*, 429 F.3d 540, 545-46 (5th Cir. 2005)); Dkt. 506, at 10 (same). On the very pages of *Olis* that petitioner cited, the Fifth Circuit explained that *Dura*'s "well-established" principles of loss causation "should be the backdrop for criminal responsibility." 429 F.3d at 546. Moreover, petitioner quoted from the *Olis* court's holding that if asset values decline for reasons other than a defendant's misrepresentation, "such decline, or component of the decline, is not a 'loss' attributable to the misrepresentation." Pet. C.A. Br. 62 (quoting *Olis*, 429 F.3d at 546); Dkt. 506, at 10

(same); see also Pet. 21-23 (quoting similar statements of the law in the Second and Ninth Circuits).

Petitioner's argument did not escape the attention of the courts below. At the sentencing hearing, for example, the district court plainly understood (and expressly rejected) petitioner's argument:

> I know that you're arguing * * * that you have to find that the loss that investors may have suffered was directly attributable to the fraud, and I understand that may be the requirement in your *typical* securities fraud case. I don't think it's the applicable law when it comes to calculating loss for sentencing guideline purposes in this *criminal* case.

July 26, 2006, Tr. 24 (emphasis added); see also *id.* at 27 (defense counsel stating that it "is not law" to attribute "every loss suffered by any victim over a two-year period * * *, the entire loss, to the alleged misrepresentations").

Despite all this, the government suggests that petitioner did not preserve this issue for further review because he "did not *specifically* develop an argument based on *Dura*," Opp. 13 (emphasis added). Respondent apparently faults petitioner for not *also* citing *Dura* when he cited cases that apply *Dura* to criminal sentencing. It is quite clear, however, that petitioner more than adequately (and, indeed, quite frequently) raised this issue below, and that the lack of a particular citation presents no barrier to this Court's review. What is more, the notion that petitioner's reliance on the Fifth Circuit's *Olis* decision somehow disguised petitioner's true

argument is baseless. The saga of Jamie Olis—who was initially sentenced to 292 months' imprisonment before this Court declared the sentencing guidelines advisory—has been followed by criminal practitioners across the country. The Fifth Circuit's adoption of *Dura*'s loss causation principles and their application when Olis was resentenced likewise garnered widespread attention. See, *e.g.*, Thomas S. Mulligan & Jonathan Peterson, *Dynegy Sentence Overturned: A Federal Appeals Court Reverses Jamie Olis' 24-year Prison Term Saying It Was Based On Inflated Loss Figures*, L.A. Times, Nov. 2, 2005, at C3. There is simply no merit to the government's claim that petitioner failed to preserve this issue.

At the end of the day, if the Eleventh Circuit had followed the rule adopted in the Second, Fifth, and Ninth Circuits—which, the government does not dispute, squarely apply *Dura*'s principles to criminal sentencing, see Opp. 12-15—it would have fundamentally changed the attribution of shareholder and bank losses to the defendant's conduct. Respondent briefly argues that application of *Dura*'s principles would have "no bearing on petitioner's sentence." Opp. 13-14. But that assertion simply begs the question—how *Dura* should apply to criminal sentencing—on which petitioner now seeks this Court's review.

The district court inappropriately attributed the *entire* declines in the values of both the shareholders' securities and the bank's swap assets to petitioner's conduct, and neither calculation attempted to arrive at the "actual economic loss" proximately caused by petitioner's conduct. See *Dura*, 544 U.S. at 344. As to the bank's alleged losses, the government's own

witness agreed that "under the government's theory" the bank sustained nearly all of its losses by September 1998 (before petitioner's conduct), and that petitioner's conduct simply caused the *recognition* of those losses as an accounting matter in December 2000. See Sep. 8, 2006, Tr. 68-70. If the district court had not rejected the application of *Dura* to this case, it would have had to reconsider, and likely revise, its findings as to both sources of loss.

b. In a final attempt to defeat review of petitioner's 30-year sentence, the government relies on the possibility that the Sentencing Commission could one day resolve the circuit conflict over the application of *Dura*'s loss causation principles. That mere hope is no answer to the clear and entrenched conflict on this important and recurring question of federal law. There is no indication that the Sentencing Commission intends to resolve the division of the circuits on this issue or that it would do so with retroactive effect in petitioner's case; nor, as in *Braxton* v. *United States*, 500 U.S. 344, 348-49 (1991), can this Court decide this specific controversy on any other ground.

More to the point, the government's assertion is scant comfort to petitioner (and numerous other defendants) who have been (or will be) sentenced to grossly excessive prison terms under a methodology that would be thrown out of court in a civil case. *Dura* affords *civil* securities fraud defendants meaningful assurances that they will be held responsible only for losses actually caused by their conduct. Surely *criminal* defendants should not face years of additional prison time—here, nearly two decades' worth without a similarly rigorous showing.

This issue is squarely presented here, ripe for review, and of paramount importance to the fair administration of the federal criminal justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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